

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

ANDREW MAURICE RANDOLPH,
Defendant-Appellant.

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Supreme Court No. 153309

Court of Appeals No. 321551

Circuit Court No. 13-33003FC-N

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Andrew Maurice Randolph

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER A DEFENDANT’S FAILURE TO DEMONSTRATE PLAIN ERROR PRECLUDES A FINDING OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL?

Court of Appeals answers, “Yes.”

Defendant-Appellant answers, “No.”

II. WHETHER THE PREJUDICE STANDARD UNDER THE THIRD PRONG OF PLAIN ERROR, *PEOPLE V. CARINES*, 460 MICH 750, 763-64 (1999) (“AFFECTING SUBSTANTIAL RIGHTS”), IS THE SAME AS THE *STRICKLAND* PREJUDICE STANDARD, *STRICKLAND V. WASHINGTON*, 466 US 668, 694 (1984) (“REASONABLE PROBABILITY” OF A DIFFERENT OUTCOME)?

Court of Appeals answers, “Yes.”

Defendant-Appellant answers, “No.”

BACKGROUND

Defendant-Appellant hereby incorporates by reference the “Background” section in his Application for Leave to Appeal, filed on March 8, 2016. After Defendant-Appellant filed his Application for Leave to Appeal, this Court requested supplemental briefing regarding the relationship between the plain error and *Strickland* standards. See 5/31/17 Order (attached as App. A). This Supplemental Brief responds to that request.

ARGUMENT

Plain error and ineffective assistance of trial counsel are fundamentally different claims. They have different underlying purposes, address misconduct by different actors, are decided on different records, and therefore have different tests. To establish plain error, a defendant must demonstrate that (1) an error occurred; (2) the error was plain, meaning that it was clear or obvious to the trial judge; (3) the plain error “affected a substantial right of the defendant;” and (4) the plain error “resulted in the conviction of an actually innocent defendant” or “seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceedings.” *People v Carines*, 460 Mich 750, 763-64 (1999). Michigan’s plain error standard is explicitly patterned after the federal plain error standard. *Id.* To demonstrate ineffective assistance of trial counsel, a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-03 (1994). Michigan’s ineffective assistance of counsel standard is also patterned after the federal standard. See *id.*

Although the tests have a parallel structure – asking first if there was wrongful conduct and then examining the effect or prejudice that flowed from that conduct – their different purposes have led to important doctrinal distinctions, both in the definition of the wrongful harm and in the prejudice inquiries. The wrongful conduct at issue in a plain error inquiry is the trial judge’s failure to recognize and correct an obvious error. As a result, the plain error analysis is

limited to the face of the trial record. In contrast, the wrongful conduct under *Strickland v Washington*, 466 US 668 (1984), is a defense attorney's failure to perform his constitutional obligation to the defendant. An examination of attorney performance under *Strickland* goes beyond the trial record to consider non-obvious errors made by counsel in addition to obvious ones.

The prejudice inquiries for plain error and *Strickland* claims are also different because (a) the analyses are performed on different records; (b) plain error prejudice, unlike *Strickland* prejudice, includes a requirement that the defendant show that he is actually innocent or that the error in question seriously affected the fairness, integrity, or public reputation of the judicial proceedings; and (c) it is possible to satisfy *Strickland* prejudice through a demonstration that the trial was fundamentally unfair whereas the third prong of the plain error prejudice analysis is explicitly outcome-determinative.

The Court of Appeals erred in Mr. Randolph's case by conflating both the wrongful conduct and prejudice inquiries. And even if the prejudice inquiries for plain error and *Strickland* are the same, the Court of Appeals distorted the prejudice standard and failed to consider the cumulative effect of the errors in this case resulting in a fundamental miscarriage of justice that merits relief.

I. Plain Error and Ineffective Assistance of Counsel Have Different Definitions of Wrongful Conduct and the Court of Appeals Erred in Mr. Randolph's Case When it Conflated Them.

Plain error and ineffective assistance of counsel claims address fundamentally different kinds of wrongful conduct by different trial actors on different records. In Mr. Randolph's case, the Court of Appeals wrongly conflated the requirement that an error be plain or obvious under *Carines* with the requirement of deficient performance under *Strickland*.

A. Different Wrongful Conduct by Different Trial Actors

The trial *judge*'s failure to correct an obvious error is the wrongful conduct in a plain error inquiry. *See, e.g., Burton v State*, 180 P3d 964, 968 (Ct App Alaska 2008) (“[T]he crucial aspect of the plain error doctrine is that it focuses on what the *judge* should or should not have done.” (emphasis in original)). In contrast, the focus of an ineffective assistance of trial counsel claim is on the actions of the *defense attorney*. *See, e.g., Strickland*, 466 US at 686 (“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on having produced a just result.”).

Waiver is treated differently under plain error and *Strickland*, because the doctrines focus on different actors. When a defendant waives a right at trial, that waiver will extinguish any later claim of plain error. *See United States v Olano*, 507 US 725, 732-33 (1993) (“Deviation from a legal rule is ‘error’ unless the rule has been waived.”). This makes sense given the plain error doctrine’s focus on the conduct of the trial judge. The trial judge commits no wrong by accepting a knowing, intelligent, and voluntary waiver of a right. The analysis is different under *Strickland* given the focus on the adequacy of defense counsel. A defense attorney who intentionally waives a defendant’s rights may provide incompetent representation under *Strickland* if an objectively reasonable attorney would not have waived the right. The question under *Strickland* is whether the defense attorney performed competently, and a defense attorney can perform deficiently by intentionally waiving a right that should not have been waived. Because the doctrines focus on different kinds of wrongful conduct by different actors, they treat the waiver question differently.

Although plain error predominantly focuses on the trial judge and asks if she adequately performed her gatekeeping role by prohibiting the commission of obvious errors, the plain error standard also seeks to create certain incentives for prosecutors and defense attorneys. Courts want to encourage timely objections by litigants at trial and prevent wasteful retrials that could have been avoided had the trial judge been notified of a potential error and given an opportunity

to correct it at trial. *See People v Cain*, 498 Mich 108, 114 (2015); *see also United States v. Dominguez Benitez*, 542 US 74, 83 (2004) (noting that the plain error standard is meant “to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error”). After all, the trial judge does not know in advance what evidence is going to be offered, and she is not privy to the respective strategies the attorneys intend to pursue at trial. For these reasons, the system relies on trial counsel to alert the judge to the existence of error when it occurs—to make it clear that a party does not intend to forfeit a right. A penalty – in the form of a higher plain error standard – creates the right incentives to ensure that litigants will raise objections at trial.

The same is not true when the question is the trial attorney’s effectiveness. Appellate courts are not trying to incentivize defense attorneys to raise their own ineffectiveness at trial. Ineffective assistance of counsel is typically raised post-trial because a trial attorney is unlikely to raise (and often will not even understand) his own incompetence. *See* 3 Crim Proc § 11.7(e) (4th ed) (2016) (“As numerous courts have noted, a lawyer is most unlikely to look to his or her own ineffectiveness in challenging a conviction. Indeed, a counsel who raises his own ineffectiveness is viewed as having placed himself in a conflict situation, requiring his withdrawal.”).

Nor is *Strickland* needed to incentivize attorneys to raise objections at trial. The plain error standard already creates that incentive, and defense attorneys are not interested in having themselves declared ineffective – a finding that could have reputational consequences as well as professional repercussions. *See, e.g.,* Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 Temp. L. Rev. 1171, 1184-1190 (1988) (collecting examples of attorney discipline based on ineffective trial assistance). As the State itself recognized in this case, “it is highly unlikely a defense counsel would fail to object just to allow his or her client to obtain a less burdensome position on appeal after a conviction – which would presume defense counsel wanted the defendant convicted so he or she could appeal and

have counsel deemed ‘ineffective.’” 8/2/17 Resp. in Obj. to Motion to Expand the Grounds for Review at 2 (attached as App. B).

Instead, *Strickland* is designed to ensure that criminal defendants get the kind of effective trial representation that the Constitution demands. As this Court has explained, “a court is obliged to intervene when defense counsel ‘accept[s] the confidence of the accused, and then betray[s] it by a feeble and heartless defense.’” *Pickens*, 446 Mich at 311 (quoting 1 Cooley, Constitutional Limitations 704 (8th ed) (alterations in original)). The focus of the deficient performance prong in *Strickland* is on whether the defense attorney’s performance “fell below an objective standard of reasonableness.” *Strickland*, 466 US at 688. It is about ensuring that the defendant receives a lawyer who acts like a lawyer by competently representing her client.

Of course, deficient performance by counsel under *Strickland* and plain error by a trial judge can occur together. For example, a defense attorney might be ineffective under the first prong of *Strickland* for failing to object, without adequate tactical grounds, to prejudicial evidence, the admission of which the trial judge should have recognized to be clear error. But the two kinds of error do not always co-exist. Even if an error is not “clear” or “obvious” enough to be “plain,” a defense attorney can be faulted under *Strickland* for failing to raise the issue if the claim is ultimately a winning claim and the defense attorney lacked adequate tactical grounds for not raising it. *See Burton*, 180 P3d at 968 (“There are many instances where, although an attorney may be acting incompetently, the attorney’s incompetence (and any accompanying injustice) will not be obvious to the trial judge – and thus there will be no plain error.”). A classic example of this situation might be the failure to raise a winning (but not clearly apparent) *Miranda* or voluntariness issue pretrial to suppress a defendant’s confession.

B. Different Records

In addition to focusing on different conduct by different trial actors, the plain error and *Strickland* inquiries are performed on different records. The requirement that an error be “plain” under the plain error test means that the error must be “clear” or “obvious” given the facts in the trial record and the applicable law. *Olano*, 507 US at 734. Because the plain error doctrine

focuses only on redressing manifest injustices that should have been addressed by the trial judge even absent an objection, it must be clear on the face of the trial record that there was an error. Otherwise, it would not be appropriate to fault the trial judge for failing to correct the error. *See, e.g., People v Young*, 472 Mich 130, 143 (2005) (refusing to recognize plain error for failure to give a cautionary accomplice instruction and noting that it was not clear as a factual matter given the record that the individuals in question were accomplices).

Because an ineffective assistance of trial counsel claim focuses on the actions of the *attorney* rather than the judge, defense counsel's conduct inside *and outside* of the courtroom is relevant. Deficient trial attorney performance exists when "counsel's representation f[alls] below an objective standard of reasonableness ...considering all of the circumstances." *Strickland*, 466 US at 688. Those circumstances include an examination of what the trial attorney failed to do in addition to what the attorney did wrong on the record. The inquiry often goes beyond the trial record, as this Court recognized in *Ginther* when it established a procedure for expanding the record to address trial attorney ineffectiveness claims. *See People v Ginther*, 390 Mich 436, 443-44 (1973).

Thus, the wrongful conduct at issue in the two inquiries is entirely distinct and is performed on different records. For plain error, the question is whether the trial judge erred in failing to recognize and correct a clear or obvious error of law given the factual record before it. For ineffective assistance of counsel, the question is whether the trial attorney performed deficiently taking into account everything that she did to prepare and present a defense, which will often require extra-record development.

In some cases, defense counsel's deficient performance in failing to present evidence at trial may be the very reason why the plain error doctrine does not provide a remedy. If an attorney's failure to make the necessary record is the reason why an error is not "clear" or "obvious" under plain error review, it might support a finding of deficient performance under *Strickland*, but no clear or obvious error under *Carines*. *See Burton*, 180 P3d at 969 ("[T]here will be instances where a defense attorney may have been acting incompetently, but the trial

judge had no reason to know this, and for this reason the appellate court will conclude that there is no ‘plain error.’) In that situation, a finding of no plain error based on the trial record should not preclude the defendant from showing deficient performance on the basis of an expanded *Ginther* record. *See id.* (“In these circumstances, the appellate court’s finding of ‘no plain error’ will not preclude the defendant’s later attempt to demonstrate the trial attorney’s incompetence in post-conviction relief litigation.”).

To hold otherwise would be at odds with this Court’s holding in *Ginther*. If the determination that an error was not plain precluded the defense from showing deficient trial attorney performance, there would be no reason to permit record expansion. This Court permits defendants to expand the record to demonstrate deficient trial attorney performance, because it recognizes that deficient trial attorney performance is *different* from plain error.¹

C. Conflation of the wrongful conduct prongs in Mr. Randolph’s case

The Court of Appeals glossed over these fundamental differences and improperly conflated the wrongful conduct prongs of plain error and *Strickland* when addressing Mr. Randolph’s hearsay, Fourth Amendment, and impermissible character evidence claims. In so doing, the Court of Appeals effectively erased much of the constitutional protection that *Strickland* is supposed to provide to defendants.

1. Hearsay evidence

Mr. Randolph alleged it was plain error for the trial court to permit Linda Wilkerson to testify that the victim – Vena Fant – told her shortly before the shooting that Mr. Randolph had called and threatened to kill members of her family. The Court of Appeals rejected this

¹ The federal courts also seem to recognize that the plain error and *Strickland* inquiries are different. There are a number of federal cases in which a defendant raises both plain error and ineffective assistance of trial counsel on direct appeal only to have the appellate court reject the plain error claim and indicate that the defendant is still free to raise the ineffective assistance of counsel claim in a 28 U.S.C. § 2255 proceeding. *See, e.g., United States v. Martin*, 36 F3d 1095, 1994 WL 483455 (CA4 1994) (unpublished) (attached as App. C). If a plain error loss were dispositive with respect to related ineffective assistance claims, the court’s invitation to raise ineffective assistance in postconviction proceedings would not make sense.

argument noting that “[w]hile there is some evidence in the record to suggest that Vena was not overcome by the stress or excitement caused by the threat, that issue was not fully explored due to defendant’s failure to object. Therefore, we cannot conclude that any error is clear or obvious.” See 5/24/15 Opinion at 4 (attached as App. D). The Court of Appeals later rejected Mr. Randolph’s argument that his trial counsel was constitutionally ineffective for failing to object to Vena Fant’s hearsay statements with the following assertion: “In this case, defendant has failed to establish plain error in the admission of alleged hearsay statements regarding the threats he made and thus his claim of ineffective assistance of counsel must fail.” (App. D at 10). These statements reveal an impermissible conflation of the wrongful conduct prongs of plain error and ineffective assistance of counsel.²

Mr. Randolph continues to maintain that the record reveals a clear and obvious hearsay violation given the affirmative testimony in the record that Vena Fant was reflecting and making conscious choices about who she would share information with and when, thus revealing that the excited utterance exception did not apply. But if the error was not clear or obvious due to defense counsel’s failure to object, that does not mean that Mr. Randolph’s ineffective assistance of trial counsel claim should automatically fail. If anything, it should *support* Mr. Randolph’s claim of deficient attorney performance for failing to object. Trial counsel should have understood that this was a circumstantial case and that these hearsay threats to kill were an essential part of the prosecution’s evidence. Trial counsel also should have known that Vena Fant’s statements were hearsay and that no exception permitted their admission. Had trial counsel objected and explained this to the trial judge, it would have become clear (if it was not

² The same conflation happened when the Court of Appeals addressed the hearsay statements by Detective Jones. Mr. Randolph alleged that it was error to admit the hearsay statements of Detective Valencia Jones that the Fant “family had stated that the defendant had left several threatening messages on their answering machine.” (T3, 13). In response, the Court of Appeals held that defendant has not shown a plain error, “and thus his claim of ineffective assistance of counsel must fail.” (App. D at 5, 10).

already) that the testimony needed to be excluded. Thus, to the extent that the error was not obvious, it was *because* counsel failed to explain it. That constitutes deficient performance. However, because the Court of Appeals conflated the wrongful conduct inquiries, it never considered whether trial counsel's performance in failing to object was constitutionally deficient.

2. Fourth Amendment Violation

Mr. Randolph alleged that the trial court plainly erred by admitting ammunition found in his belongings and guns found in his brother's apartment, because they were fruits of an illegal search of his belongings. With respect to his allegation of plain error, the Court of Appeals agreed that the police clearly had no valid consent to search Mr. Randolph belongings. (App. D at 5). In response to the prosecution's argument that Mr. Randolph had abandoned his belongings such that he had no Fourth Amendment interest in them anymore, the Court of Appeals stated that the record lacked sufficient information to determine whether he had abandoned his property. (App. D at 5-6). The Court of Appeals then concluded, "[b]ecause the available record is insufficient to establish a Fourth Amendment violation, defendant has not shown plain error." (App. D at 5). With respect to the gun, the Court of Appeals went further, noting that, "even assuming that the ammunition was found as the result of an illegal search, the record does not contain sufficient information to determine whether the gun was likewise subject to suppression." (App. D at 6).

When addressing Mr. Randolph's later claim that counsel was constitutionally ineffective for failing to file a motion to suppress the ammunition and gun, the Court of Appeals again conflated the plain error and *Strickland* tests, noting that "defendant has failed to establish plain error in the admission of the evidence regarding the ammunition ... and the guns, and thus his related ineffective assistance of counsel claims must also fail." (App. D at 10). This conflation of the wrongful conduct prongs of plain error and ineffective assistance is problematic for the reasons discussed above. If the Fourth Amendment violation was not obvious or clear because trial counsel failed to object or file a motion that would have made it clear, then the failure to

demonstrate plain error should support a claim of ineffective assistance of trial counsel rather than result in its automatic rejection.

The Court of Appeals's conflation of these standards is particularly problematic given its failure to indicate what record it was relying on when making its determinations. Mr. Randolph continues to argue that the trial record contains sufficient information to demonstrate (a) that he did not abandon his belongings and (b) that the gun was discovered as a derivative, tainted fruit of the illegal search of his belongings. But the testimony of Mr. Randolph's father at the *Ginther* hearing provided additional evidence that Mr. Randolph had not abandoned his belongings – evidence that would have been relevant to his ineffective assistance of counsel claim even if it was not considered as part of the plain error analysis.

For example, Mr. Randolph's father testified that when members of the Fant family brought Mr. Randolph's belongings over to the house on the day of the shooting, they were packed in bags and the Fant family instructed him to “give ‘em to him [referring to Mr. Randolph] when he shows up, give ‘em his clothes.” (H1, 29). Thus, the Fant family did not think that Mr. Randolph had abandoned his belongings. Rather, they believed that he would be coming for them. Mr. Randolph's father also testified that Mr. Randolph was “real particular about his clothes and things,” (H1, 30) which would also undermine any suggestion that he had abandoned them. Finally, Mr. Randolph's father testified that Mr. Randolph came to get his belongings as soon as he was released after being arrested. (H1, 32). That is hardly the action of a man who had intentionally abandoned his belongings.

The Court of Appeals's automatic rejection of Mr. Randolph's ineffective assistance of trial counsel claim based on its earlier rejection of plain error means that it ignored the remand evidence presented in this case – evidence that buttressed Mr. Randolph's Fourth Amendment claims. By ignoring all of the evidence presented on remand, the Court of Appeals effectively gutted this Court's instruction in *Ginther* to permit record expansion for *Strickland* claims. *Ginther*, 390 Mich at 443-44 (providing for the remand procedure).

3. Impermissible Character Evidence

Mr. Randolph also objected to the admission of improper character evidence – namely, testimony about the ammunition that was found in his belongings and the federal arrest warrant that was issued based on his possession of that ammunition. The Court of Appeals rejected Mr. Randolph’s argument that it was plain error to admit this evidence suggesting that it was relevant for a non-character purpose. (App. D at 6).³ When addressing Mr. Randolph’s argument that his counsel was constitutionally ineffective for failing to object to the impermissible character evidence, the Court of Appeals stated, “defendant has failed to establish plain error in the admission of the evidence regarding the ammunition [and] defendant’s arrest on the federal warrant... and thus his related ineffective assistance of counsel claims must also fail.” (App. D at 10).

The Court of Appeals’s conflation of the plain error and ineffective assistance of trial counsel standards confuses the separate wrongful conduct inquiries of the two doctrines. If it was unclear to the trial judge on the face of the record that the ammunition and the federal arrest warrant should have been excluded, it was only unclear because defense counsel failed to object

³ In so holding, the Court of Appeals committed the very error that this Court recently cautioned against in *People v Denson*, No. 152916, 2017 WL 3027046 (Mich July 17, 2017). Instead of “closely scrutiniz[ing] the logical relevance of the evidence under the second prong of the *VanderVliet* test” and weighing that relevance against its potential unfair prejudice, the Court of Appeals permitted the admission of this highly inflammatory and impermissible character evidence simply “because the proponent ... articulated a permissible purpose.” *Id* at *8. The Court of Appeals stated that evidence of ammunition in Mr. Randolph’s possessions “explained why a federal warrant was issued for his arrest” and “[t]he fact that defendant was arrested pursuant to a federal arrest warrant on another charge explained why defendant had been arrested again despite the absence of any new evidence against him. Finally, the circumstances of defendant’s arrest explained how the murder weapon was located and provided a connection between defendant and that weapon.” (App. D at 6). However, none of this information was a necessary part of the prosecution’s narrative at trial. The prosecution could simply have indicated that a separate investigation led them to Mr. Randolph’s brother’s house where they found Mr. Randolph and the weapons. The jury did not need to know the highly prejudicial and inflammatory basis of that separate investigation, and the Court of Appeals erred in simply deferring to the State’s suggestion that this improper character evidence was “relevant” to its story.

and explain why any minimal narrative relevance that this evidence had was substantially outweighed by the danger of unfair prejudice. *See People v Vandervliet*, 444 Mich 52, 74 (1993). By failing to consider whether trial counsel's deficient performance was the reason why an error was not apparent, the Court of Appeals failed to disentangle the two different wrongful conduct prongs and never properly considered Mr. Randolph's ineffective assistance of trial counsel claim with respect to this evidence.

II. Plain Error and Ineffective Assistance of Counsel Have Different Prejudice Requirements, and the Court of Appeals Erred in Mr. Randolph's Case When it Conflated Them.

Plain error and ineffective assistance of counsel also have different prejudice requirements. For plain error, once the defendant has demonstrated an error that was clear or obvious on the face of the record, the defendant must show that the plain error (3) "affected a substantial right of the defendant" and (4) "resulted in the conviction of an actually innocent defendant" or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of innocence. *Carines*, 460 Mich at 763-64. To establish prejudice under *Strickland*'s ineffective assistance of counsel standard, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 US at 694; *see also Pickens*, 446 Mich at 302-03 (adopting the *Strickland* test). Alternatively, prejudice may be presumed "when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent." *Roe v Flores-Ortega*, 528 US 470, 484 (2000); *see also Weaver v Massachusetts*, 137 S Ct 1899, 1911 (2017) (suggesting that a defendant could show prejudice by demonstrating that his attorney's errors rendered the trial fundamentally unfair, even absent a showing of a reasonable probability of a different outcome); *Ledet v Davis*, No., 4:15-CV-882-A, 2017 WL 2819839, at *14 (ND Tex June 28, 2017) (noting that, under *Strickland*, "[t]he burden is on the

defendant to show either a reasonable probability of a different outcome in his case or that the particular ... violation was so serious as to render his trial fundamentally unfair” (citing *Weaver*, 2017 WL 2674153, at *11)).

This Court has long interpreted the third prong of the plain error test as typically requiring the defendant to show outcome-determinative prejudice. As this Court said in *Carines*, the third requirement “generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Carines*, 460 Mich at 763.⁴ The United States Supreme Court has subsequently explained that, to meet the third criterion in *Olano*, “an error must be ‘prejudicial,’ which means that there must be a reasonable probability that the error affected the outcome of the trial.” *United States v Marcus*, 560 US 258, 262 (2010); *see also Dominguez Benitez*, 542 US at 83 (holding that, to establish plain error during a plea colloquy, the defendant must show “a reasonable probability that, but for the error, he would not have entered the plea” and noting that this means the defendant must demonstrate that “the probability of a different result is ‘sufficient to undermine confidence in the outcome’ of the proceeding”).

At first glance, it might appear that the Supreme Court was incorporating the *Strickland* prejudice standard into the third prong of plain error prejudice. After all, it cited *Strickland* in *Dominguez Benitez* when it announced its interpretation of the third prong of plain error, *see id*, and the language the Court used in *Dominguez Benitez* and *Marcus* tracks the *Strickland* prejudice standard’s language. But there are four reasons why the prejudice standards for plain error and ineffective assistance remain distinct even though one part of their tests is similar. First, the prejudice analysis for plain error is performed on a different record than the ineffective assistance analysis. Second, the plain error standard has an additional prejudice requirement in its fourth prong that makes it harder for defendants to demonstrate plain error prejudice than to

⁴ *Carines* and *Olano* both left open the possibility of a special category of errors, yet to be defined, in which prejudice is presumed. *Carines*, 460 Mich at 763 n.8; *Olano*, 507 US at 735; *see also People v Vaughn*, 491 Mich 642, 666 (2012) (noting that “our caselaw suggests that a plain structural error satisfies the third *Carines* prong”).

show prejudice from deficient attorney performance. Third, the different underlying purposes and assumptions of the two doctrines justify that higher prejudice requirement for plain error. And fourth, the *Strickland* prejudice requirement can be satisfied through a demonstration of fundamental unfairness whereas the third prong of *Carines* is explicitly outcome determinative. This Court has, in the past, recognized that the *Strickland* and *Carines* prejudice inquiries are different. See, e.g., *People v Vaughn*, 491 Mich 642, 673-74 (2012); *People v Fackelman*, 489 Mich 515, 537 n.16 (2011). It should reaffirm those cases and find that the Court of Appeals erred in Mr. Randolph's case when it conflated the plain error and *Strickland* prejudice inquiries.

A. Different Records

Even as the United States Supreme Court was relying on *Strickland*'s language when discussing the prejudice inquiry under the third prong of the plain error test, it was also careful to recognize that there were still important distinctions between plain error prejudice and *Strickland* prejudice. It noted that "[o]ne significant difference" between plain error claims and *Strickland* claims is that *Strickland* claims "permit greater development of the record." *Dominguez Benitez*, 542 US at 83 n. 9. As discussed above, because plain error review is focused on the trial judge's actions, it is limited to the trial record. When the appellate court is asking whether there is a reasonable probability that the error affected the outcome of the trial, its analysis is confined to the evidence that appears in the trial transcript. In contrast, when a reviewing court is considering whether a trial attorney's deficient performance undermined confidence in the outcome of the proceeding, it may consider evidence outside of the original trial transcript.

Consider for example a case in which one of four eyewitnesses to a crime testifies at trial that his view of the crime and the alleged perpetrator was completely obstructed, but then proceeds to positively identify the defendant as the perpetrator without any objection. Permitting that testimony to enter the record is likely a clear and obvious legal error, but the reviewing court might conclude that there was no reasonable probability that the error affected the outcome given that there were three other eyewitnesses who had a clear view of the crime, all of whom identified the defendant as the perpetrator. But now suppose that we learn at a later *Ginther*

hearing that trial counsel not only failed to object to the eyewitness's inadmissible testimony; he also failed to investigate and discover clear ways to impeach the testimony of the other eyewitnesses. Now, with the strength of the other eyewitness evidence compromised, the reasonable probability that the failure to object affected the outcome would be different. Stated differently, the prejudice inquiries for plain error and *Strickland* are different because they are based on different records. See *Ex parte Taylor*, 10 So3d 1075 (Ala 2005) ("There may be situations in which the record on direct appeal is not developed as to the substantive issue being reviewed for plain error as a consequence of counsel's performance, and the record as submitted on direct appeal, therefore fully supports a conclusion of no plain error. However, on subsequent review of facts developed surrounding counsel's performance with regard to the issue, the more developed record might lead to the conclusion that counsel's errors ... 'were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'") (Stuart, J., concurring); see also Kristin Traicoff, *Closing Two Doors: How Courts Misunderstand Prejudice under Olano and Strickland*, 21-Wtr Crim. Just. 24 (2007) (noting that "the evidentiary basis of [the two claims] is distinct," because plain error is "confined to the 'four corners' of the trial transcript" whereas *Strickland* claims "can present evidence outside of the trial transcript to supplement a claim").

Relatedly, because the records are different, the cumulative prejudicial effect of the errors will also be different. A cumulative plain error prejudice analysis only considers the combined effect of the errors that were clear on the face of the record whereas a cumulative *Strickland* analysis considers the combined prejudicial effect of counsel's on-the-record and off-the-record errors.

B. The Fourth Prong of the Plain Error Analysis

In addition to performing the prejudice analysis on different records, the plain error prejudice standard is explicitly higher than the prejudice standard for trial attorney ineffectiveness claims. The last two prongs in the *Carines* plain error test relate to prejudice. *Carines*, 460 Mich at 763-64. In addition to the third prong, which requires the defendant to

show a reasonable probability that the result of the proceeding would have been different but for the plain error, the defendant also must convince the reviewing court that “the plain forfeited error resulted in the conviction of an actually innocent defendant” or that it “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” *Id.* There is no similar heightened showing required to satisfy the *Strickland* prejudice standard. The United States Supreme Court clearly envisioned the fourth *Olano* prong as imposing a prejudice requirement over and above even that of the third *Olano* prong. And even then, reversal under *Olano* is discretionary whereas reversal is obviously mandatory when the two *Strickland* prongs are satisfied. *Carines*, 460 Mich at 763 (noting that “an appellate court must exercise its discretion in deciding whether to reverse” when conducting a plain error inquiry).

The third and fourth prejudice prongs in the plain error test are interpreted by many courts to be “in practice coterminous.” Michael H. Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error; A New Paradigm for Criminal Cases*, 43 Crim L Bull 955, 971 (2007). As Justice Viviano recognized in *Cain*, “[n]othing in law or logic dictates that we must treat the third and fourth *Carines* prongs as separate silos.” *Cain*, 498 Mich at 154 (Viviano, J. dissenting). In fact, this Court does not always treat them as separate silos. For example, in *People v Bynum*, 496 Mich 610, 631-35 (2014), in the course of holding that the admission of impermissible character evidence about the defendant’s gang membership was plain error, this Court considered the third and fourth prongs of *Carines* together under a “prejudice” subheading.

For this reason, it is particularly dangerous when a reviewing court says that a defendant’s failure to demonstrate prejudice under plain error means that the defendant cannot satisfy the *Strickland* prejudice requirement. A reviewing court’s decision that it will not, in its discretion, find that a plain error resulted in the conviction of an innocent person or seriously affected the integrity of the proceedings does not automatically mean that the error cannot

undermine confidence in the trial outcome. If it did, there would be no need to have the fourth prong of the *Carines* test.

C. The Different Underlying Purposes and Assumptions of the Two Doctrines Justify a Higher Prejudice Standard for Plain Error.

Many courts, including this one, have recognized that “[t]he plain error standard requires that an error impair the reliability of the judgment of conviction to a greater degree than the *Strickland* prejudice standard.” *Hagos v People*, 288 P3d 116, 117 (Colo. 2012) (en banc); *Fackelman*, 489 Mich at 537 n.16 (emphasizing that plain error “requires the *higher* showing”); see also *Taylor*, 10 So3d at 1078 (“[A] determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under *Strickland* ...”); *Deck v State*, 68 SW3d 418, 428 (Missouri 2002) (en banc) (holding that the *Strickland* prejudice standard is lower than the plain error standard).

A higher prejudice standard for plain error claims makes sense when one considers the underlying purposes of the two doctrines. Plain error doctrine presumes that the underlying trial was fair and that deference should be afforded to the reliable results of that fair trial. See *Deck*, 68 SW3d at 428 (noting that the deference built into the plain error prejudice standard presupposes that “all of the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged”). Reversal for plain error will only be permitted when there is a particularly extreme error that is serious enough to overcome that presumption of a fair and reliable trial.

At the same time, the plain error standard is not so high as to make relief impossible, because it must leave room for appellate courts to redress manifest injustices when they arise. As the Colorado Supreme Court explained, “[p]lain error review reflects a ‘careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.’” *Hagos*, 288 P3d at 121-22. When the criminal justice system is working properly and there is a competent defense attorney, an ethical prosecutor, and an impartial judge, egregious errors should be rare, and the deference

baked into the plain error standard is appropriate. Reversal will only be permitted when the defendant can show, for example, that the judge's error in admitting obviously impermissible evidence was egregious enough to overcome the presumption that the trial was fair and reliable.

In contrast, the *Strickland* standard does not presuppose that there has been a reliable and fair trial process. Rather, an allegation of trial attorney ineffectiveness is an indictment of the fairness and reliability of the trial process itself. As the United States Supreme Court said in *Strickland*, “[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower.” *Strickland*, 466 US at 694. Defense counsel plays a role that is “critical to the ability of the adversarial system to produce just results.” *Id* at 685. For this reason, deficient performance by an attorney undermines confidence in the fairness of the trial proceedings and should result in reversal based on a lesser demonstration of prejudice.

Plain error also differs from *Strickland* in that plain error claims are explicitly disfavored. This Court has long recognized that plain error is reserved only for “compelling or extraordinary circumstances.” *People v Grant*, 445 Mich 535, 546 (1994) (“As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances.”); *see also Carines*, 460 Mich at 761-62 (“This Court disfavors consideration of unpreserved claims of error.”). As this Court recognized in *People v Cain*, errors will inevitably occur even in a generally reliable and fair trial process such that “a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal” and would discourage litigants from raising claims at trial. *Cain*, 498 Mich at 115 (quoting *Puckett v United States*, 556 US 129, 134 (2009)); *see also Hagos*, 288 P3d at 122 (“[R]eversals must be rare to maintain adequate motivation among trial participants to seek a fair and accurate trial the first time.”). Thus, the higher prejudice standard for plain error serves an important practical purpose. It ensures that appellate courts are not reversing for every small error and incentivizes defense attorneys to raise all claims at trial.

Unlike plain error, *Strickland* is not explicitly designed to be invoked only in rare or “extraordinary circumstances.” *Grant*, 445 Mich at 546. Whenever an attorney performs deficiently and that deficient performance prejudices a defendant, there has been a constitutional failure that merits relief. There is, of course, the hope that such constitutional failures will be rare. But, in Michigan, the unfortunate truth is that poor defense attorney performance at the trial level is common. According to a 2008 report, Michigan ranked 44th in the country in per capita spending on indigent defense. See Nat’l Legal Aid & Defender Ass’n, “A Race to the Bottom,” Evaluation of the Trial-Level Indigent Defense Systems in Michigan, at 6 (2008), available at http://www.nlada.net/sites/default/files/mi_racetothetbottomjseri06-2008_report.pdf. Defenders throughout the state are underfunded and overworked. See *id.* Many carry caseloads that are 500-600% greater than national standards. *Id.* at 23. They often have no investigators or support staff to help them handle this crushing volume of cases. *Id.* at 1, 12, 37, 42, 51, 59, 68, 85-87. As a result, indigent defendants in many parts of Michigan routinely go to trial with attorneys who have not investigated their cases or researched their legal issues. *Id.*⁵

Mr. Randolph’s case presents a stark example of the rampant structural ineffectiveness that exists in Michigan. At the *Ginther* hearing, Mr. Randolph’s trial attorney explained that, in the same month as Mr. Randolph’s murder trial, he had an armed robbery trial, a first-degree criminal sexual conduct trial, and a murder trial that last three weeks. (H1, 41). On top of that, he was handling 60% of the court’s probation violations. (H1, 41). And this is a typical workload for him. He explained that he already had five cases set for trial in the first week of the next month (H1, 41). He also explained that he has no one to help him research, investigate, and present defenses in these cases. He is a solo practitioner who has no secretary, no investigator,

⁵ In response to this crisis, the government has since created the Michigan Indigent Defense Commission and tasked it with making recommendations for improvement. But, as this Court knows, the path to reform is slow and difficult.

no paralegal, and no law clerks (H1, 42). In his words, “[w]hen you call my office you get me.” (H1, 42).

In recognition of the importance of addressing ineffective assistance claims, Michigan is among the minority of states that has chosen to locate such claims on direct appeal instead of relegating them to the postconviction process. *See Ginther*, 390 Mich at 443-44. This Court’s decision to devote the time and resources necessary to give defendants an opportunity to open their trial records through the *Ginther* process not only demonstrates this Court’s commitment to ensuring that defendants receive adequate defense representation; it also shows that ineffective assistance of counsel is not extraordinary. It is enough of a problem to merit the development of an entire mechanism to redress the problem on direct appeal.

Unlike with plain error, there is also no practical need for a heightened prejudice standard in the *Strickland* context in order to incentivize proper behavior. The State itself has recognized that there is no reason to believe a defense attorney will fail to present or pursue potentially meritorious arguments in the hopes of being declared ineffective on appeal. *See* 8/2/17 Resp. in Obj. to Motion to Expand the Grounds for Review at 2 (attached as App. B) (“[I]t is highly unlikely a defense counsel would fail to object just to allow his or her client to obtain a less burdensome position on appeal after a conviction – which would presume defense counsel wanted the defendant convicted so he or she could appeal and have counsel deemed ‘ineffective.’”). As discussed earlier, being declared constitutionally ineffective would have both adverse reputational consequences and could result in bar discipline. *See* Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 Temp. L. Rev. 1171, 1184-1190 (1988).

An ineffective assistance of trial counsel claim is also different from a plain error claim, because, in most instances, it is a *preserved constitutional* claim. Here, Mr. Randolph did everything he could to present and preserve his Sixth Amendment claim. He timely requested a *Ginther* hearing, made the requisite showing to get a remand, presented evidence at an evidentiary hearing, argued his ineffective assistance of trial counsel claim to the trial court, and

then, having properly preserved the issue, presented his claim to the appellate courts. The procedural posture of a properly preserved *Strickland* claim is thus fundamentally different from that of an unpreserved claim. See *Chapman v California*, 386 US 18 (1967) (requiring the prosecution to prove that a preserved, constitutional error is harmless beyond a reasonable doubt in order to avoid reversal); *Pickens*, 446 Mich at 345-46 (noting that Michigan has adopted the *Chapman* standard of harmless error review for preserved, constitutional claims). There is no need to ratchet up the prejudice inquiry to encourage litigants to raise the claim below, because, in most cases, the Sixth Amendment claim has been properly raised below.

Nor is a heightened prejudice standard needed in the *Strickland* context in order to cabin the number of reversals. The deficient performance prong in *Strickland* is much harder to satisfy than the requirement of clear error in the plain error inquiry. Deficient attorney performance is not nearly as easy to show as a clear error. Deficient performance entails more than simply defense attorney error. Instead, counsel must perform below an objective standard of reasonableness. In determining whether there was objectively unreasonable performance by an attorney, a reviewing court must give counsel “wide latitude” to make tactical decisions and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 US at 689. Thus, the high standard for demonstrating deficient performance in the *Strickland* analysis ensures that reversals do not occur for every counsel error and incentivizes defense attorneys to present their best claims at trial. A heightened prejudice standard is therefore not necessary to incentivize behavior in the same way that it is for the plain error analysis.

For all of these reasons, the plain error prejudice standard is justifiably higher than the *Strickland* prejudice standard. Plain error prejudice, unlike *Strickland* prejudice, includes a requirement that the defendant show that he is actually innocent or that the error in question seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, 460 Mich at 763-64.

D. The third prong in Carines contains a different prejudice analysis than Strickland.

Even without the fourth prong, the third prong of the *Carines* plain error prejudice analysis is not the same as the *Strickland* prejudice analysis. First, as discussed above, the analyses are performed on different records. Additionally, it is possible to satisfy *Strickland* prejudice through a demonstration that the trial was fundamentally unfair whereas the third prong of the plain error prejudice analysis is explicitly outcome-determinative.

In *Strickland*, the United States Supreme Court made it clear that “the ultimate focus of the [ineffective assistance of trial counsel] inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 US at 696. The Supreme Court recently reiterated that the *Strickland* standard’s focus on the fundamental fairness of the proceeding infuses its interpretation of the prejudice requirement. *Weaver*, 137 S Ct at 1911. The Court noted in *Weaver* that “[i]n the ordinary *Strickland* case, prejudice means ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.* When that reasonable probability exists, it undermines judicial confidence in the fairness of the proceeding and presents enough of a risk that the trial was fundamentally unfair that it merits reversal. But, in *Weaver*, the Court also assumed that it would be possible to demonstrate prejudice under *Strickland* if the defendant could show that his attorney’s errors rendered the trial fundamentally unfair, even absent a showing of a reasonable probability of a different outcome. *Id.*

The Supreme Court’s willingness to entertain the latter claim reflects a fundamental difference between plain error prejudice and *Strickland* prejudice. For plain error, the defendant must show outcome determinative prejudice (prong three) AND that the error seriously affected the fairness, integrity or public reputation of the proceedings or resulted in the conviction of an innocent person (prong four). *Carines*, 460 Mich at 763-64. In contrast, it is possible under *Strickland* that a defendant need only show that his counsel’s errors resulted in a reasonable probability of a different result OR fundamental unfairness independent of any effect on the outcome. *Weaver*, 137 S Ct at 1911. The possibility of satisfying *Strickland*’s prejudice

requirement without demonstrating outcome-determinative prejudice distinguishes the *Strickland* prejudice inquiry from the third prong of plain error. As this Court said in *Carines*, the third prong of plain error requires the defendant to show that the error affected his substantial rights, which “generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Carines*, 460 Mich at 763. In contrast, lower courts now recognize that, under *Strickland*, “[t]he burden is on the defendant to show either a reasonable probability of a different outcome in his case or that the particular ... violation was so serious as to render his trial fundamentally unfair.” *Ledet*, 2017 WL 2819839, at *14 (citing *Weaver*, 2017 WL 2674153, at *11)).

E. This Court has recognized that plain error and Strickland prejudice are different.

This Court has recognized that the plain error and ineffective assistance of counsel standards are different and should not be conflated. For example, in *People v Fackelman*, 489 Mich 515 (2011), this Court joined the high courts of other states in recognizing that plain error requires a higher showing by the defendant than ineffective assistance of trial counsel. *See id* at 537 n.16 (emphasizing that plain error “requires the *higher* showing”); *see also Hagos*, 288 P3d at 122 (“[I]neffective assistance of counsel claims allow for reversal upon a showing that an error impaired the reliability of the judgment of conviction to a lesser degree than plain error review would require”); *Burton*, 180 P3d at 969-70 (noting that the plain error prejudice inquiry is relevant to the *Strickland* prejudice inquiry, but noting that the defendant “might still be able to show that there is good cause to re-assess the appellate court’s conclusion that there was no reasonable probability that the error harmed the defendant – for example, by showing that any competent defense attorney would have chosen a different overall litigation strategy at the defendant’s trial”); *Taylor*, 10 So3d at 1078 (“[A] determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under *Strickland*”); *Deck*, 68 SW3d at 428 (holding that the *Strickland* prejudice standard is lower than the plain error standard); *see also* Anne Bowen Poulin, *Tests for*

Harm in Criminal Cases: A Fix for Blurred Lines, 17 U Pa J Const L 991, 1008 (2015) (noting that plain error demands more of the defendant than *Strickland*).

Three years later, this Court decided *People v Vaughn*, 491 Mich 642 (2012), holding that the trial court's error in closing the courtroom during voir dire in violation of the right to a public trial was not plain error and that counsel's failure to object to the courtroom closure did not rise to the level of ineffective assistance. In so holding, this Court explicitly drew a distinction between the third prong in *Carines* and *Strickland* prejudice. *Id* at 665, 673-74. The Court held that a plain structural error will not automatically satisfy the *Strickland* prejudice standard, but rather that the defendant must typically demonstrate actual prejudice.⁶ *Id* at 673-74. In contrast, the Court noted that Michigan case law "suggests that a plain structural error satisfies the third *Carines* prong," but emphasized that the defendant must still make the higher prejudice showing that the plain error resulted in the conviction of an innocent person or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id* at 666-67.

But this Court has not always been consistent in its recognition that plain error and *Strickland* involve different inquiries. See, e.g., *People v Kowalski*, 489 Mich 488, 510 n.39 (2011) (stating that a defendant failed to satisfy *Strickland*'s prejudice inquiry "[f]or the same reasons that we conclude that the defendant failed to show outcome-determinative prejudice under the plain-error standard"). For the reasons discussed above, and in keeping with *Fackelman* and *Vaughn*, this Court should clarify once and for all that plain error and ineffective assistance of counsel claims have different standards focused on different analyses such that a finding of no plain error does not automatically mean that an ineffective assistance of trial counsel claim must also fail.

⁶ The Court did recognize an exception: "'when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding' or 'when counsel is burdened by an actual conflict of interest.'" *Vaughn*, 491 Mich at 671.

F. The Court of Appeals improperly conflated the prejudice inquiries in Mr. Randolph's case.

In addition to improperly conflating the wrongful conduct inquiries, the Michigan Court of Appeals also improperly conflated the prejudice inquiries of its plain error and ineffective assistance of counsel analyses when entertaining Mr. Randolph's objections to the admission of hearsay and impermissible character evidence. When addressing Mr. Randolph's claim that Vena Fant's hearsay testimony was obviously inadmissible and therefore plain error, the Court of Appeals first determined that any error was not obvious and then held that Mr. Randolph could not satisfy the plain error prejudice standard even if an obvious error occurred. (App. D at 4). Later, the Court of Appeals rejected Mr. Randolph's claim that counsel was ineffective for failing to object to this hearsay testimony and noted that "defendant cannot show that he was prejudiced by counsel's failure to object for the reasons discussed earlier." (App. D at 10).

Similarly, the Court of Appeals rejected Mr. Randolph's objection to the admission of improper character evidence on plain error grounds, noting first that there was no obvious error and then that there was not sufficient prejudice to satisfy the plain error standard even assuming that there was error. (App. D at 6). Later, the Court of Appeals disposed of Mr. Randolph's claim that his trial attorney was ineffective for failing to object to this impermissible character evidence by stating that "defendant has failed to establish plain error in the admission of the evidence regarding the ammunition, defendant's arrest on the federal warrant ... and thus his related ineffective assistance of counsel claims must also fail." (App. D at 10).

The Court of Appeals's holding that a failure to satisfy the heightened prejudice requirement for plain error necessarily means that a later *Strickland* claim will fail shows that it misunderstands two fundamental differences between these prejudice standards: First, that these prejudice analyses are conducted on different records. And second, that the plain error prejudice standard is higher.

The Court of Appeals's conflation of the two prejudice inquiries reveals that it did not conduct the *Strickland* prejudice inquiry on the expanded record as *Ginther* requires. As a result,

the Court of Appeals ignored the many ways in which the evidence presented at the *Ginther* hearing undermined the strength of the State's case in ways that should have mattered to the *Strickland* prejudice inquiry.

The State presented a circumstantial case at trial, asking the jury to conclude that Mr. Randolph was the shooter because he had fought with the victim's daughter that day, he had threatened the family that day, he had gunpowder residue on his hands that night, he had ammunition in his possessions that night that he was not permitted to have given that he was a felon, and the murder weapon was ultimately found in his brother's apartment. The Court of Appeals considered the prejudicial effect that would flow from any plain error relating to the improper admission of hearsay and/or character evidence against the backdrop of this other evidence. The Court of Appeals believed that the improper admission of the hearsay and/or character evidence did not satisfy *Carines*'s prejudice prongs given the other evidence of guilt. *See* App. D at 4 (noting that Mr. Randolph's conviction "was supported by other evidence unrelated to this hearsay statement"). But some of that other evidence of guilt was deemed unreliable after the *Ginther* hearing testimony. The trial judge determined that the defense's expert at the *Ginther* hearing was credible and that there was no reliable scientific evidence that Mr. Randolph had gunpowder on his hands the night of the shooting. *See* 6/12/15 Order at 1-2 (attached as App. E). Had the Court of Appeals properly considered the evidence presented at the *Ginther* hearing and how it undermined the State's case, its *Strickland* prejudice analysis would have been different. But because it relied on the wrong record, the Court of Appeals ignored the *Ginther* hearing evidence that undermined the State's case and failed to consider the prejudicial effect of counsel's errors in light of the State's now even weaker circumstantial case.

Not only did the Court of Appeals conflate the two prejudice standards; it explicitly and erroneously heightened the *Strickland* prejudice standard by stating that it would not be enough if Mr. Randolph demonstrated that there was a reasonable probability that the results of the proceeding would have been different had it not been for counsel's errors. In addition, the Court of Appeals stated, "[d]efendant must **also** show that 'the result that did occur was fundamentally

unfair or unreliable.” (App. D at 9 (emphasis added)) Although it is true that the ultimate focus of the *Strickland* inquiry is on whether the trial was fundamentally unfair, the Supreme Court in *Strickland* explained that one way to show fundamental unfairness was by demonstrating “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 US at 694. When that reasonable probability exists, it “undermine[s] confidence in the outcome” and indicates that the trial was fundamentally unfair. *Id.* Thus, once a reasonable probability of a different result has been shown, there is no additional requirement to show that the result was unreliable or unfair in some other way. The Court of Appeals’s suggestion that the defendant must “also” make some additional showing was erroneous.

If anything, the Supreme Court’s recent decision in *Weaver* suggests defendants may be able to establish *Strickland* prejudice by showing a reasonable probability of a different outcome or fundamental unfairness in some other way that is independent of an effect on the outcome. *Weaver*, 137 S Ct at 1911; *see also Ledet*, 2017 WL 2819839, at *14 (noting that, under *Strickland*, “[t]he burden is on the defendant to show either a reasonable probability of a different outcome in his case or that the particular ... violation was so serious as to render his trial fundamentally unfair” (citing *Weaver*, 2017 WL 2674153, at *11)). If *Strickland* required both a showing of effect on the outcome and a separate showing of fundamental fairness, it would not have made sense for the Supreme Court to have entertained the petitioner’s argument in *Weaver*. Rather, it appears that the Court of Appeals ratcheted up the *Strickland* prejudice inquiry to put it on par with *Carines*’s third and fourth prongs. That conflation was erroneous and should be corrected.

For the reasons discussed in Defendant-Appellant’s Application for Leave to Appeal, Mr. Randolph maintains that the erroneous admission of this damaging hearsay and character evidence was prejudicial under the higher plain error prejudice test. But even if it was not, the Court of Appeals never analyzed its prejudicial value under the lower *Strickland* threshold, and the evidence was certainly prejudicial enough to merit reversal under that lower standard. Mr.

Randolph's trial was riddled with error and was so fundamentally unfair as to undermine confidence in the outcome of the proceedings.

III. Even if the Plain Error and Ineffective Assistance of Counsel Prejudice Standards are the Same, the Court of Appeals Distorted the Prejudice Standard and Failed to Consider the Cumulative Effect of the Errors in This Case Resulting in a Fundamental Miscarriage of Justice that Merits Relief.

Even if the third prong of the *Carines* plain error analysis is the same as the *Strickland* prejudice inquiry, Mr. Randolph has demonstrated that, but for the erroneous admission of evidence and/or the incompetent performance of his attorney, there is a reasonable probability that the result of his trial would have been different. Mr. Randolph's trial was fundamentally unfair and was plagued by numerous errors. The trial judge himself recognized that junk science had been admitted against Mr. Randolph. *See* 6/12/15 Order at 1-2 (attached as App. E). The Court of Appeals held that Mr. Randolph's trial attorney provided constitutionally deficient performance by failing to conduct adequate investigation and formulate a reasoned trial strategy (App. D at 10). The State concedes and the Court of Appeals recognized that the trial judge made a serious legal error in admitting hearsay evidence. (App. D at 3). The Court of Appeals recognized that Mr. Randolph's belongings were searched on the basis of illegally obtained consent and evidence obtained from that search was admitted against him. (App. D at 5). The Court of Appeals also recognized that the prosecution never gave notice, as it is legally required to do under MRE 404(b)(2), of its intention to offer damaging character evidence against Mr. Randolph. (App. D at 6).

The effect of the many errors in this case, individually and cumulatively, undermines confidence in the outcome of this trial – a trial that was based on purely circumstantial evidence—and should be enough to merit reversal. But the Court of Appeals failed to properly apply the *Strickland* prejudice standard to the facts and failed to consider the cumulative prejudice to the

defendant, thus rendering a decision that was “clearly erroneous and will cause material injustice” if permitted to stand. *See* MCR 7.305(B)(5)(a).

A. *An Improper Prejudice Analysis*

The Michigan Court of Appeals erred when considering what facts and evidence are relevant to a *Strickland* prejudice inquiry. The Court of Appeals found that Mr. Randolph’s trial counsel performed deficiently by failing to object to the admission of the preliminary gunshot residue test. *See* App. D at 10 (“To the extent that counsel adopted this strategy primarily because that is what defendant wanted and thus did not investigate whether the residue test evidence could be excluded, that was not objectively reasonable because counsel is not required ‘to press nonfrivolous points requested by the client’ simply because the client wants him to. Rather, it is counsel’s obligation to examine the record, research the law, and use his professional judgment to determine the most promising issues and arguments to raise.”). Having determined that counsel performed deficiently by failing to object, however, the Court of Appeals concluded Mr. Randolph was not prejudiced by this deficiency. *Id.* To do so, the Court of Appeals engaged in a highly speculative discussion of evidence that was never presented and arguments that were never made in an effort to suggest that, had this fictional evidence and fictional arguments been presented, the jury would then have concluded that the preliminary gunshot residue test was suggestive rather than conclusive. Stated differently, in the Court of Appeals’s fictional world, there would have been no prejudice because there would have been evidence that mitigated the effect of the test results.

There are two problems with this approach: First, this mitigating evidence was never presented to the jury or to the trial court in the *Ginther* hearing. When a reviewing court is conducting the *Strickland* prejudice inquiry it may consider only “the totality of the evidence *before the judge or jury.*” *Strickland*, 466 US at 685. If the reviewing court can speculate and make up whatever additional evidence it wants to mitigate the effect of highly prejudicial testimony that was admitted as a result of deficient attorney performance, then no deficient performance will ever be prejudicial. What was before the court in Mr. Randolph’s case was the

testimony of two police officers that Mr. Randolph's hands tested positive for gunpowder on the night of the shooting. That was incredibly damaging evidence in this circumstantial case.

Second, the Court of Appeals's fictional analysis of what would have happened had trial counsel challenged the preliminary gunshot residue test is contrary to the record. After the *Ginther* hearing, the trial judge found the defense expert to be credible and concluded that the preliminary gunshot residue test was "not reliable." (App. E at 1-2). Thus, if trial counsel had objected to it, the most likely result is that the trial judge would have excluded it. *See Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993); *Gilbert v DaimlerChrysler Corp.*, 470 Mich 749, 782 (2004). The correct counterfactual world describing what would have happened had counsel objected to the preliminary gunshot residue test is one in which the test would have been excluded altogether, and the jury would not have considered that incredibly damaging piece of junk science. Given the circumstantial nature of the case against Mr. Randolph, there is a reasonable probability that the verdict would have been different without that evidence.

B. Failure to Consider the Cumulative Prejudice to the Defendant

The Supreme Court has made it clear that the *Strickland* prejudice inquiry is inherently cumulative in nature. *See Strickland*, 466 US at 696 ("Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."). This requirement makes sense given the focus of the ineffective assistance of counsel inquiry. If the reviewing court is trying to determine whether the trial was fundamentally unfair, it must look at the total, cumulative effect of all of counsel's deficiencies. *See, e.g., United States v Dado*, 759 F3d 550, 563 (CA6 2014) ("[T]he court must consider the cumulative effect of the alleged errors, since '[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'"). It would be improper for a reviewing court to parse ineffective assistance of trial counsel claims and dismiss them individually for failing to satisfy the prejudice inquiry. But that is precisely the

error that the Court of Appeals committed when it went through each allegation of deficient performance and decided that the failure to satisfy plain error prejudice on that claim necessarily meant that Mr. Randolph's ineffective assistance of counsel would also fail.

Similarly, to determine whether the plain errors in this case met the third and fourth *Carines* prongs, the Court of Appeals needed to address the cumulative effect of the many errors that occurred. *See Fackelman*, 489 Mich at 539-40 (considering in the course of a plain error analysis how the "evidentiary errors that occurred at defendant's trial compounded the prejudice caused by the [constitutional] violation"); *see also People v LeBlanc*, 465 Mich 575, 591 n.12 (2002) (noting that "the unfair prejudice of several *actual* errors can be aggregated to satisfy the standards set forth in *People v Carines*").

The Michigan Court of Appeals never performed a cumulative prejudice analysis. Instead, it went through each individual error, dismissing each error as failing the plain error test. Then, when the Court addressed Mr. Randolph's ineffective assistance of trial counsel claims, it repeated the process. For each error that it rejected on plain error grounds, it rejected the corresponding ineffective assistance of counsel claim suggesting that a failure on plain error meant a failure on ineffective assistance. The conflation of the two standards meant that the Court of Appeals never considered the cumulative effect of the many errors that infected Mr. Randolph's trial.

Had the Court of Appeals considered the cumulative effect of *either* the trial judge's failure to screen out obviously inadmissible evidence *or* trial counsel's many errors in failing to object to impermissible evidence, it would have determined that there was sufficient cumulative prejudice to merit reversal of Mr. Randolph's conviction. The prosecution's case was completely circumstantial – a fact that the prosecutor recognized when he devoted time during voir dire to speaking with prospective jurors about their views on circumstantial evidence (T1, 38-42). In opening statements, the prosecution outlined four pieces of evidence that were critical to its case: the fight that Mr. Randolph had with his girlfriend, the threats that Mr. Randolph allegedly made, the gunpowder residue on his hands, and the murder weapon found at his

brother's apartment. (T1, 141). Almost all of that evidence was improperly admitted because of trial counsel's deficient performance and the trial court's failure to prevent obvious legal error.

Without the improperly admitted evidence, the State's entire case rested on the fact that Mr. Randolph and his girlfriend had a fight that morning (against background testimony that they often fought), that Mr. Randolph had made some veiled threat to Mr. Miller about wanting to "do somethin' about" the fight that he and his girlfriend had that morning, and an angry voice mail message that Mr. Randolph left for his girlfriend that contained no audible threat.⁷ There is a reasonable probability that a jury would not convict someone of murder based on that evidence. In fact, the police did not believe that was sufficient evidence even to hold Mr. Randolph on a murder charge (T1, 140).

To establish that Mr. Randolph was the shooter, the State relied on the hearsay threats that Mr. Randolph allegedly made on the day of the shooting – particularly the statements of Vena Fant, the preliminary gunshot residue test results, the discovery of the murder weapon at Mr. Randolph's brother's house, and improper character evidence suggesting that Mr. Randolph was the type of person who would commit this kind. None of that evidence was admissible. Instead of recognizing the cumulative harm that flowed from the improper admission of this evidence, the Court of Appeals went through each claim individually and concluded that each error, standing alone, was insufficient to merit reversal.

To avoid the obvious prejudicial effect of the improperly admitted hearsay statements made by Vena Fant, the Court of Appeals suggested that her statements were relevant only to

⁷ The Court of Appeals's statement that the recorded message contained "a threat of some sort" (App. D at 3) is belied by the record. The voice mail message is a part of the record. It contains no threats. And Kanisha Fant testified to that effect at trial describing the voice mail message in the following terms: "[h]e was trying to flip the situation. Like yelling and screaming to ask me why he woke up with a knife to his neck. He said 'I'm tired of y'all family. Everybody always messing with me. Um, just things of that nature, Just yelling – a lot of it I couldn't really make out, cause he was yelling and screaming so loud.'" (T1, 172). Saying that you are tired of someone or someone's family is not a threat.

demonstrate Mr. Randolph's premeditated intent to kill and that it was therefore harmless given that the jury acquitted Mr. Randolph of the first-degree murder charge. (App. D at 4). But that conclusion is belied by the record. The prosecutor relied on the impermissibly admitted hearsay threats not just to argue about Mr. Randolph's intent, but to demonstrate that he was the shooter (T4, 89-90, 92, 119). The prosecutor asked the jury to rely on its common sense of probabilities to determine that Mr. Randolph was the killer: "Now what are the odds that on that same night that he's calling, Vena actually gets shot the way he's saying it's gonna happen? That's 1 in something, pretty big number on the bottom, that's a pretty small probability" (T4, 119). Thus, the impermissible hearsay was relevant to the identity of the shooter and not just the question of intent. And, as this Court has recognized, a jury's decision to acquit on a higher-level offense may indicate that the jurors question the credibility of the state's case and are reaching a compromise of sorts. *See, e.g., People v Shafier III*, 483 Mich 205, 315-16 (2009) (noting that the fact that the jury acquitted on some higher-level offense shows at least some jurors questioned the credibility of the state's evidence). If anything, the decision to acquit on first-degree murder suggests that the jury had questions about the state's version of events such that the exclusion of other impermissible, inflammatory evidence would be more likely to have affected the verdict.

To avoid the obvious prejudicial impact of the results of the preliminary gunshot residue test, the Court of Appeals distorted the *Strickland* prejudice inquiry as described above. Under a proper analysis, admitting this seemingly scientific test was highly prejudicial in this circumstantial case. The fact that the test results were presented through the testimony of police officers exacerbated the prejudicial effect. This Court has already recognized that testimony offered by police officers is more likely to be prejudicial because it has "an aura of reliability and trustworthiness." *Bynum*, 496 Mich at 633 n.41 (quoting *People v Murray*, 234 Mich App 46, 55 (1999)). The jurors likely believed the officers' testimony that the preliminary gunshot test "proved" that Mr. Randolph had fired a gun that night, which was incredibly damaging (albeit junk) scientific evidence.

Because of the Court of Appeals's conflation of the plain error and *Strickland* tests, it never considered the prejudicial effect of the improperly admitted gun. Admission of this evidence was essential to the prosecution's case. The prosecutor admitted to the jury that "based on the evidence that [the police] had [that night] there was still not yet enough to hold Andrew Randolph on murder they thought" (T1, 140). It was not until the police recovered the firearms that they were even able to *charge* Mr. Randolph.

As for the impermissible character evidence, this Court recently emphasized just how unfairly prejudicial impermissibly admitted character evidence can be. *See People v Denson*, No. 152916, 2017 WL 3027046, at *12 (Mich July 17, 2017) ("We have noted that other-acts evidence carries with it a high risk of confusion and misuse ... When a 'defendant's subjective character [is used] as proof of conduct on a particular occasion, there is a substantial danger that the jury will overestimate the probative value of the evidence.'"). The risk that the jury will convict because it views the defendant as a bad person in light of inflammatory character evidence is particularly high when there is "little hard evidence and the prosecutor improperly sought to establish [defendant's] bad character." *People v Knox*, 469 Mich 502, 513 (2004) (finding plain error based on the improper admission of character evidence). That is precisely what happened here. The prosecutor used evidence that Mr. Randolph was a felon in possession of ammunition to portray Mr. Randolph as someone who violated the law and possessed weapons. In closing, the prosecutor emphasized that Mr. Randolph was ineligible to carry a weapon or have ammunition and then stated, "he's got 357 rounds. Why?" (T4, 86). The prosecutor was clearly suggesting that Mr. Randolph was the type of person who would violate the law and carry weapons and thus was more likely to have been the type of person who would commit this crime.

Without the erroneous admission of all of this evidence, there was a reasonable probability that the jury would have reached a different verdict. Beyond that, the sheer number and quality of these errors "seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceedings." *Carines*, 460 Mich at 763-64. This was a circumstantial murder case

riddled with serious constitutional and nonconstitutional errors. The trial judge admitted clearly inadmissible hearsay evidence, obvious junk science that violated Mr. Randolph's Confrontation Clause rights, impermissible character evidence, and a weapon obtained through a clear Fourth Amendment violation. These plain and obvious errors affected Mr. Randolph's substantial rights, and the sheer number and combined importance of these errors undermined the fairness, integrity, and public reputation of the judicial proceedings in this case. Thus, Mr. Randolph satisfied his burden of demonstrating plain error, and the Court of Appeals erred in holding otherwise.

Mr. Randolph has also shown that, absent his trial attorney's errors, there is a reasonable probability that the result of his trial would have been different. He has also shown that his attorney's many errors rendered his trial fundamentally unfair. *See Weaver*, 137 S Ct at 1911; *Ledet*, 2017 WL 2819839, at *14. Mr. Randolph was facing first-degree murder charges. His attorney failed to investigate his case; failed to consult any experts; failed to conduct even minimal legal research regarding obvious legal issues in the case; failed to file a suppression motion that could have excluded an essential piece of evidence implicating his client; and failed to object to (a) junk science that was admitted through hearsay testimony that violated Mr. Randolph's confrontation clause rights, (b) incredibly prejudicial hearsay statements, and (c) inflammatory character evidence. Instead, Mr. Randolph's trial attorney decided to call his client a "jerk," an "ass," and an "insufferable" person to the jury. (T4, 100-109; H1, 72; H2, 14-15).

Demonstrating deficient performance is not an easy task given the presumptions that *Strickland* imposes. Defense attorney decisions are presumed to be tactical and *Strickland* instructs courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 US at 689. The Court of Appeals correctly recognized that Mr. Randolph overcame these hurdles and demonstrated that his trial attorney's performance was deficient. (App. D at 10). Counsel's failures in this case were serious, pervasive, and consequential. Mr. Randolph never had a fair trial. His trial was infected

by error at every turn and is precisely the kind of fundamentally unfair trial that should not be permitted to stand.

RELIEF SOUGHT

For all of the above reasons, alone and collectively, Mr. Randolph respectfully requests this Court grant leave to appeal to address these issues or peremptorily reverse his convictions and remand for a new trial.

Respectfully submitted,

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